92-206

NO. 92-206

Supreme Court, U.S.
FILED
JUL 28 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
OF AMERICA

OCTOBER TERM, 1991

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Respondent.

v.

BRADLEY ALAN PURDY, D.L. and J.L.,
and D.L. as Guardian ad Litem
of C.L. and A.L., Minors,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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Petitioners D.L., J.L.
and D.L. as Guardian ad
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STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

DEPOSITION OF BRADLEY PURDY

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

Page 58:3-4

Q You didn't intend to cause them any harm?

A No.

Page 61:18-62:5

Q You certainly didn't intend to harm them, did you?

A No, sir.

Q But thinking about it, being honest about it, you had to have in your mind an expectation that they would suffer

some degree of emotional distress, didn't you?

A While I was molesting?

Q During that time frame?

A No.

Q You had no thoughts one way or the other?

A No.

Q And you had no thoughts that they could expect to have some adverse consequences?

A No.

Page 63:2-9

Q During the time you were having sexual contact with the boys, you were still experiencing a good deal of that pain, weren't you?

A Yes. If I can interject something real quick. At that time, it was something to me that was more of a compulsion, I wanted to know why this had happened to me, what had happened, and I did not consider anything else of the consequences.

Pages 73:11-75:23

Q Brad, Mr. Deibert asked you questions regarding your victimization of sexual contact; you recall those questions?

A Yes.

Q And I understand and appreciate the fact that that's not a very happy period of your life, and that you've had to deal with the results of that experience for quite some time, have you not?

A Yes.

Q And I think it's probably a fair statement that that caused you quite a lot of emotional trauma; is that correct?

A I suppose so, yeah. I don't know exactly what you mean by quite a lot or anything like that. I was obviously traumatic for me, yes.

Q And you've had to deal with that for a number of years and you had to deal with it a number of year prior to the

contact you had with the Lerback children; is that correct?

A Yes.

Q And you were obviously fully aware of the trauma that you suffered at the time that you had the sexual contact with the Lerback children, were you not?

A I don't believe I was, no. I don't think I fully understood. I think that's what induced me to do what I did.

Q But you were fully aware of the trauma it had caused you, that being at the time, embarrassment, guilt?

A I was aware that I had those feelings from it, yes.

Q Were you aware that those feelings could also be imposed upon the Lerback children as a result of the same type of conduct to them?

Mr. Duffy: Object to the question and this line of questioning in that he's already answered a rather -- in a rather

sensitive area, he's already given full and complete answers to all these questions.

Mr. Barker: Subject to that objection, Brad.

A Can you repeat the question for me, please?

Mr. Knudsen: I'd join Mr. Duffy's objection.

Mr. Duffy: I'll object to the form in that it's unclear what you mean by those feelings.

Mr. Covey: I'll join in that objection.

Mr. Barker: Yeah, Kathy, would you read it back please?

(Requested question was read by the Court Reporter)

Mr. Barker: Go ahead if you can.

Mr. Duffy: Well, we're going to clear form objections up at the time of the deposition, so I still have the form objection to those feelings.

Q Brad, those feelings I was referring to in the question just prior to that,

those feelings that you testified to of guilt and remorsefulness and --

A Fear.

Q Fear.

A At the time I molested the children, no, I had no thought whatsoever that that could be imposed also on them.

Q That never entered your mind during the two-year period in which those incidents took place?

A No.

Pages 76:15-77:15

Q (By Mr. Knudsen) In response to a question by Mr. Deibert, and I believe it was an interjection you made and a pause after answering the question, you stated that you felt a compulsion to have this sexual contact with the children. Do you recall that testimony?

A Yes.

Q Could you define for me how you felt compelled to have this sexual contact?

A It's hard for me to try to explain what I was feeling at the time. It was an overriding need, if you will, for me to try to figure out what had happened to me. That was -- that was the only think that was on my mind at the time. I didn't think of anything else really.

Q My understanding of the word compulsion or compel, compulsion mainly, is that you aren't able to resist that impulse. Is that how you're using the term compulsion?

A Perhaps I chose the wrong word. It was more impulsive, more or less because it was never really planned out. I never went over actually thinking this is what I'm going to do. Certain things would trigger memories and things in my mind.

Q And then, the act would occur?

A Yes.

Page 81:1-18

Q Next, in response to Mr. Knudsen's first question here on redirect, you testified that when you first initiated the sexual contact with Christian and/or Andrew Lerback, you needed to try to figure out what had happened to you when you victimized, is that right?

A Yes.

Q In other words, was this somewhat of an experimental thing?

A I'm not certain exactly how I viewed it. I guess in retrospect, yes, it was somewhat of an experimental thing. I don't know.

Q You used the term impulsive or compulsive, is that right?

A I did, yes.

Q And each of these six or eight times it was compulsive or impulsive, is that right?

A It was impulsive, yes.

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

AFFIDAVIT OF DR. FRED McCALL-PEREZ

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

State of Florida)
) ss.
County of Dade)

Fred McCall-Perez, Ph.D., being first duly sworn upon his oath, deposes and states:

1. I am a Certified Clinical Psychologist, with a Ph.D. in Learning Disabilities/Psychology from the University of Arizona, an M.A. in Development Psychology from Ohio State University, and a B.S. in Mental Retardation from the

University of Illinois. Presently, I am the General Manager of American Biodyne, Inc., Miami, Florida.

2. I have reviewed the Minnesota Multiphasic Personality Inventory ("MMPI") of Bradley Alan Purdy taken on August 11, 1989. Based upon my review of that information and based on other information available in the form of deposition testimony of Brad Purdy, statements given to the police by Brad Purdy and Christian Lerback, Intake Summary prepared by West River Mental Health Center, testimony of Brad Purdy and Richard Leir at the mitigation and sentencing hearing held August 5, 1986, it is my opinion that Brad Purdy suffers from impulse control problems. Mr. Purdy indicates that he is suffering from anxieties and fears, and when those anxieties and fears become intense, Mr. Purdy is likely to act out sexually.

3. It is my opinion that when acting out sexually, Mr. Purdy does not intend to

harm the victim of his acts; rather, I believe that Mr. Purdy's personality is of a type that would act out in this manner purely for his own sexual gratification and this type of person would convince himself or herself that the sexual contact was a form of love and friendship and was as pleasurable for the victim as for the perpetrator.

4. It is my opinion that Brad Purdy, at the time he sexually molested the Lerback children, did not intend any harm toward those children.

Dated this 2nd day of January, 1990.

Dr. Fred McCall-Perez

Subscribed and sworn to before me this ____ day of _____, 1989.

Notary Public

(SEAL)

My Commission Expires:

SEVENTH JUDICIAL CIRCUIT COURT
May 1, 1990
File No. 88-1209
MEMORANDUM DECISION
****
RE: American Family Mutual v. Purdy
****

Gentlemen:

This is a declaratory judgment action in which the Plaintiff, American Family Mutual seeks a determination as to coverage under a home owner's policy. Plaintiff claims that the acts of sexual contact committed by
Bradley Purdy are excluded from coverage based on the fact that harm to the boys was "Expected or intended". Brad Purdy has admitted to sexual contact with the Lerback children. Presently before the Court is Plaintiff's Motion for Summary Judgment.

The standards for Summary Judgment are clear in this state and will not be reiterated here. Summary Judgment would be appropriate in this case only if the Court could say, as a matter of law, that Bradley Purdy "Expected or intended" to cause harm

to the Lerback children. Brad Purdy testified that he did not intend harm on the children, and that his actions were motivated by selfishness with no consideration whatsoever as to the consequences his actions would have on the children. In further opposition to Plaintiff's Motion for Summary Judgment, Defendant's have presented the Affidavit of Dr. Fred McCall-Perez, a certified clinical psychologist. Dr. McCall-Perez opined that Brad Purdy "suffers from impulse control problems," and "does not intend to harm the victims of his acts." He further stated that someone with Mr. Purdy's personality acts out "purely for his own sexual gratification" and convinces himself that the "sexual contact was a form of love and friendship and was as pleasurable for the victim as for the perpetrator." The Plaintiff is asking the Court to essentially ignore this evidence and rule

as a matter of law that harm was expected or intended. This I cannot do.

The Court is well aware that a number of jurisdictions have ruled as a matter of law that in sexual contact cases, harm is intended or expected. In order for the exclusion to apply, a subjective finding that the insured "expected or intended" to cause harm by his actions must be made. The issue of a perpetrator's subjective intent, as in a criminal case, is a question of fact to be determined by the trier of fact. This Court thus relies on the minority view as expressed in J.C. Penney Casualty Ins. Co. v. M.K. 257 Cal. Rptr. 801 (Cal. App. 4 Dist. 1989) which found that "the matter of coverage should be determined on a case by case basis after a consideration of competent evidence, including psychiatric testimony," relevant to the insurer's subjective state of mind. Id. at 810. Because this Court refuses to

rule as a matter of law that Brad Purdy subjectively expected or intended to cause harm by his actions, the Plaintiff's Motion for Summary Judgment is denied.

Counsel for the Defendants may prepare an appropriate order for my signature. If anyone has any questions regarding this decision, please do not hesitate to contact me.

Sincerely,

JEFF W. DAVIS
Circuit Court Judge

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

CONTINUED ORDER

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

Defendants, David Lerback, Jani Lerback and David Lerback as Guardian ad Litem of Christian Lerback and Andrew Lerback ("Lerbacks"), through Donald P. Knudsen of Gunderson, Palmer, Goodsell & Nelson, their attorneys, moved for a continuance of the trial tentatively scheduled in this action for December 18, 1990. Plaintiff, through Douglas Deibert,

of Cadwell, Sanford & Deibert, its attorneys, moved the Court to set aside its previous order denying plaintiff's Motion for Summary Judgment, or in the alternative, for summary judgment on the coverage issue. Plaintiff appeared through its attorney, Douglas Deibert, Lerbacks appeared through their attorney, Donald P. Knudsen, and defendant, Bradley Alan Purdy, appeared through his attorney, Patrick Duffy. The parties filed briefs and the Court heard oral argument. The Court granted Lerbacks' Motion for Continuance and denied plaintiff's Motion to Set Aside Previous Order Denying Motion for Summary Judgment, or in the Alternative, Motion for Summary Judgment.

IT IS ORDERED:

1. That Lerbacks' Motion for Continuance is granted. Trial of this matter shall be scheduled for January 25, 1990, commencing at 9:00 a.m.

2. That plaintiff's Motion to Set Aside Previous Order Denying Motion for Summary Judgment, or in the Alternative, Motion for Summary Judgment is denied.

Dated this 17th day of December, 1990.

BY THE COURT:

JEFF W. DAVIS
Circuit Court Judge

ATTEST:

Clerk of Courts, Ranae Truman

By_____
Deputy

(SEAL)

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

JURY TRIAL

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,
vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

PROCEEDINGS: Held before the Honorable John K. Konenkamp, Circuit Judge at Rapid City, South Dakota on the 24th day of January, 1991.

****

MR. COVEY: At this time I would renew and I would ask the Court to reconsider its ruling as to Brad Purdy testifying with regard to the effects of his victimization himself in light of the testimony that has

already been received with respect to other victims and the effects upon them.

THE COURT: I am going to adhere to my ruling. I certainly have had a chance to think about that since the matter was first brought up, but in addition to what I have said earlier, to permit Mr. Purdy to testify that he was sexually abused himself and that now he's been able to work though that, in a sense makes him an expert witness on his own case. And unless you can establish that he's an expert witness in this area, he shouldn't be able, permitted to give an expert opinion, because what you are offering to do is suggest that the Lerback boys are not as damaged perhaps as they claim they are because Mr. Purdy, from his own experience, isn't as damaged, that damaged. That's purely an issue of expertise and you haven't offered me any indication that he

has some expertise in sexual abuse under 801 and 803.

MR. COVEY: As far as the word expert relating to experience, I think he may have the best experience, I think he may have the best experience for the area, however, I understand what the Court is saying with respect to the other qualifications.

THE COURT: If you analogize it to the cancer patient being an expert in their disease because they learn a lot about it experientially, but that doesn't necessarily make them an expert on the disease for the purposes of testifying in Court about someone else's damages. Any other motions from the defense?

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

APPEAL TRANSCRIPT

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,
vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

DIRECT EXAMINATION OF DR. FRED McCALL-PEREZ
BY: MR. DONALD P. KNUDSEN:

Q Doctor, would you state your name and address for the record.

A Fred McCall-Perez, 1581 Brickel Avenue, Miami, Florida.

Q Can you tell us about your educational background.

A Yes. I am a clinical psychologist.

I have an undergraduate degree in mental retardation from the University of Illinois. Masters in developmental psychology from Ohio State University, a Ph.D. in learning disabilities, and clinical psychology from the University of Arizona.

Do you want my experience and background?

Q Yes, please.

A After graduating from the University of Arizona, I was teaching at the University of Arizona Medical School for 12 years, department of psychiatry and relevant to the case backgroundwise, I formed and was party to a sexual assault evaluation and research team, which began studies in the mid-1970's, formalized as an ongoing

unit in 1979, and, as part of that cooperation, we are doing ongoing research and work with victims, survivors of sexual assault, and I have been with other companies.

I have been with American Biodyne, which is a mental health care company in 13 states.

I am currently, most recently, as of this month, with a company called U.S. Behavior Health. This is based in San Francisco, and I run the southern operations, which includes mental health facilities for several states.

Q Doctor, I am going to show you what has been marked Defendant's Exhibit 2.

Could you describe that document for me?

A This is my resume' updated to about three months ago.

Q Can you tell us what you have done in the last three months that you would like to add to that resume'.

A Two things.

One under professional experience, my current job is behavior health, as I mentioned, and, secondly, under publications, I have a publication in December of 1990, in a magazine called Childwise, which deals with preschool children sexual assault and, in January of 1991, deals with sexual assault with school-age children.

PAGE 11:9-13:1

Q Doctor, you were retained to render an opinion as to whether

Bradley Purdy intended to harm Andrew and Christian Lerback or whether Bradley Purdy expected they'd be harmed as a result of his actions; is that correct.

A Yes.

PAGE 13:7-14:11

Q Doctor, based on the materials that you reviewed and the observations you have made, have you formed an opinion to reasonable psychological certainty regarding whether Brad Purdy intended to harm Andrew Lerback or Chris Lerback?

A Yes.

PAGE 15:24-16:4

Q Doctor, once again, with regard to the question of whether Bradley Purdy intended to harm

Christian or Andrew Lerback, what is your opinion on that?

A My opinion is that he did not intend to bring harm to Andrew or Christian Lerback.

Q On what do you base that opinion?

A On several things.

First of all, the MMPI, the interpretation, and the diagnostic impression really describes a personality type person, narcissistic, very self-centered personality type.

It significantly is not a personality type of somebody who would have the personality makeup or characteristics that would most probably assume an intention to harm.

Secondly, in reviewing all the materials, the depositions and the testimony, what I was looking

for was any indication of intent to harm.

I was unable to find any indication whatsoever of that intent.

Additionally, in the testimony offered yesterday by Brad Purdy himself, he described himself as somebody not intending to provide harm.

In addition to that, during the courtroom proceedings yesterday, not as part of the testimony, but as part of what was presented during the courtroom behavior, the attorneys and Brad, there was an expressed desire on the part of Brad Purdy to present himself and his history of his own abuse, and present himself as an example of how abuse had not really affected him in any adverse ways,

and he was expressing a desire to make the argument that therefore, he was a good example of how abuse would not necessarily be hurtful or harmful, and offering that as to why the kids were not in fact harmed.

All of those things, all the evidence I reviewed and the reports including the mental health report were considered in coming to that opinion.

PAGE 17:13-19:1

Q On the question of expectation of harm, Doctor, based upon the materials which you reviewed and the observations which you have made, have you formed an opinion to a reasonable psychological certainty regarding whether Bradley Purdy expected that harm would occur to Christian and

Andrew as a result of Mr. Purdy's sexual fondling?

A Yes, I have reached an opinion in that area.

Q What is your opinion?

A My opinion is that he did not expect any harm to come to the children.

That, quite to the contrary, that his own behavior is quite repetitive, unconscious and conscious, unconscious in terms of desire and motivation, with the actual -- I think he sees himself as someone who is not in any way trying to bring harm to the children whatsoever.

PAGE 19:6-22

Q You said your opinion was that he did not -- he did not impress you as being someone who expected harm to occur to the children.

What did you rely on in reaching that opinion?

A I was looking for evidence to the contrary.

In other words, I was looking for some evidence that his intent was to cause harm to the children in any way, so I relied primarily on the things that I mentioned earlier, particularly on the personality profile and his makeup of the tests administered in August of 1989, and his behavior in the courtroom yesterday, the lack of any of the other symptoms that would indicate any kind of harm or intent.

Q Or expectation?

A Expectation, right.

Q Doctor, is there literature available regarding an abuser's

knowledge, regarding the effect it has on the victim?

A Yes, there is. There is at least two types of literature.

There is literature that just describes psychological makeup and the psychodynamics of abusers.

There is also research that clearly indicates that abusers have a much higher chance of becoming abusers themselves in our own studies and in other people's studies that have been published.

The group of abusers are more likely to abuse others and the explanation for that is a couple of things.

Number one, there really is not a -- the abusers see themselves personalitywise as not harming

somebody else as they often see society is in the way of kind of a good thing or restricting their own behavior, and, therefore -- and in addition to that, they are more likely, most likely like most of us to treating their own kids or children the way that they have been treated, which is a fairly unconscious process that happens to most of us. They are most likely going to raise their kids or treat kids the way they were treated when they were younger.

Q What does the literature say about the perpetrators, things to that effect?

A The perpetrator pretty much believes -- they minimize the affects on children through a lot of denial processes where they

may often acknowledge for society or the world otherwise that this is not a good thing.

It is more -- I guess the analogy is it's more like a bad habit, like somebody who eats chocolate and knows it's not good for them. They really don't have a recognition that the abuse has long-term and short-term consequences on their victims.

Q Do they feel it is just -- that the children are harmed by the sexual abuse?

A Generally they do not.

Q Did you notice anything in Brad about whether he felt what he had done to the children harmed them?

A I was looking for that.

I did not find anything indicating that he felt he had harmed the children in any way.

Quite the contrary.

Q Did you see anything that would give you an impression that he expected harm to occur as a result of the sexual abuse to the Lerback children?

A No, sir.

His testimony, his deposition, description of how he treated the children, what his expectations were when he was with the, what he did, how he did it, and yesterday's behavior in the courtroom all indicated otherwise. All indicated he's not expecting harm to come.

Q The activities in the courtroom that you are referring to was -- what you referred to earlier in your testimony?

A There is two things in the courtroom.

One was his testimony on the witness stand where he answered the question about the intent to harm and clearly I found him -- I found his testimony to be credible, that he didn't intend to harm the children.

Secondly, the way -- throughout the morning -- I don't know if it was a recess -- a period of time where he approached the bench and expressed a desire to make his argument known to the Court about his own abuse, and he attempted to minimize the effect on the children.

Q Doctor, the fact that the abuse occurs numerous times over a period of time with intervals in between, would that lead to a conclusion that the abuser thinks

about the affects of his behavior on the victim?

A That would not lead me to that conclusion, no, sir.

Q Why not?

A Having time in between the abuses -- I mean there is time there, so there is time to reflect on that. Abusers, pedophiles, typically are, and in Bradley, his personality makeup is not of a personality type nor has he indicated he would use that time in a resourceful manner, meaning being reflective about his own behavior.

Quite the contrary. Very impulsive, very narcissistic and pedophile, those three things together would indicate a very habitual, particularly under

stress, behavior of sexual interests in children.

There is really no indication of reflective thinking process about his own behavior, that combined with his minimizing and expressing what he believes to be very minimal affects of sexual abuse on others.

My conclusions would be other than what you stated.

Q What about Brad's testimony in his deposition that he would tell himself that he didn't want it to happen again, that he didn't think any good could come from it?" Do you recall that sort of testimony?

A Yes, I recall that.

My impression of that professionally was pedophile BS.

Q What do you mean by pedophile BS?

A I mean that that is a typical response of pedophiles when interviewed or saying something to please others around them, has no relevance to or indication about change, actually changing behavior.

Quite the contrary. Under stress, pedophiles are more likely to act out again.

Q Now, you are aware that Brad was a victim of sexual abuse?

A Yes, sir.

PAGE 20:9-25:6

Q Were you able to observe Brad Purdy yesterday at the trial?

A Yes, sir.

Q Based on your observations and the testimony that you heard there, were you able to gain an impression, form an opinion regarding Brad Purdy's feelings

about the affect his own sexual molestation had on him?

A Yes sir.

Q What is that opinion?

A That he would really just describe it very minimally, that he used himself as an example to others as to how the sexual abuse really did not affect him very much, that he was a successful law student at this point in time.

Q Based on that observation and what you are able to gain from the MMPI and the other materials that you reviewed, would you say that Brad's first-hand knowledge of the affects on him of the sexual abuse would cause him then not to abuse others?

A No, sir.

May I explain?

Q Sure.

A First-hand knowledge, information, even insight for all of us about our behaviors doesn't necessarily lead to a change in behavior.

You can describe that very accurately.

I can tell you a lot of traits about myself that I don't like, but I don't necessarily translate that into being different so, just the knowledge or his intelligence or information about it wouldn't necessarily, in any way, affect the change in behavior, and it may affect a desire to, you know, to stop the behavior, and it may not.

PAGE 26:1-27:8

Q You have testified to Brad's perception of the affects of his

own sexual abuse on himself was that it was minimal.

How would that affect his own thinking about the affects his sexual abuse on others might have?

A Okay. Pedophiles generally minimize their behavior and interpret their affect on children differently than most of us.

In the case of Brad, the same thing applies.

In other words, he minimizes the affects on himself and also certainly believes that the affects are minimal if at all on children.

Most pedophiles actually believe their behavior may be of benefit. I don't now what about Brad. I believe from what I reviewed that

he believes the affects are minimal.

Q Does the fact that Brad Purdy may be average or above average intelligence in any way influences thinking about what affects the sexual abuse has on his victims?

A Pedophiles come in all colors and intelligence levels.
His level of intelligence wouldn't be related to his thought processes or feelings about abusing children.

PAGE 28:9-29:6

CROSS EXAMINATION BY MR. DIEBERT

Q So far as the intent issue goes, Brad Purdy obviously didn't intend to harm these children, did he?

A My belief is that he did not intend to harm the children.

PAGE 35:25-36:4

EXAMINATION BY THE COURT:

Doctor, I have just a couple questions. Both counsel have been putting it to you from their perspective in language that purports to deal on a legal basis here.

I want to make sure that I understand the nuts and bolts, I guess, of what you are saying and, then, later apply the legal test that has to be applied.

As I would understand your testimony this morning, not all sexual offenders are, say, in a mold; some more than others could intend or understand that their actions could cause harm even though they may try to minimize it or say the right thing to throw people off the track. For

example, you talk about the pedophile BS that was inherent in some of the studies and quantitatively what you have tried to do here is look at the material that was presented to you and determine where Mr. Purdy, in your opinion, would fit and what his actions were.

A Correct.

THE COURT: Someone else could look at the same situation and say he intended or he should have known whatever the case might be.

A Somebody else could say that. The discriminator that I didn't really talk about, in other words, Brad or another pedophile, if there was a diagnosis of psychotic, or if somebody had caused physical harm to the children, then, my argument would

be washed out, you know, and you find that most pedophiles will go to great lengths to tell you how they wouldn't ever bring harm to this child because they are coming from they think loving and also be a sexual way of wanting to relate to children. I would suspect that most people would give a pretty similar interpretation. Maybe not. I can't speak for other people.

THE COURT: I understand that.

PAGE 55:11-56:21

DIRECT EXAMINATION OF MICHAEL J. MCGRATH, Ph.D. BY MR. DIEBERT:

Q State your name, please.

A Michael J. McGrath.

Q How old are you?

A 43.

Q Are you employed?

A Yes I am.

Q Where?

A The VA Hospital, and I also have a private practice.

Q VA Hospital, where?

A Sioux Falls.

Q What is the nature of your work at the Veterans Administration and your private practice?

A I am a clinical psychologist, and my work basically consists of two phases, doing evaluations for various purposes and psychotherapy.

PAGE 59:16-60:16

Q Have you had any training, experience, or involvement in sexual abuse type of cases?

A Yes, I have.

Q What does that involve?

A Training has involved various workshops, training seminars that have been put on over the years.

The experience includes doing evaluations both for forensic purposes and for the Department of Social Services, and, also, I have worked with both victims and perpetrators of sexual abuse.

Q Of course, I have retained you in this litigation to evaluate, offer expert testimony concerning the issues here, particularly the conclusions, opinions, and testimony of Dr. McCall-Perez; is that right?

A Correct.

Q What have you reviewed before reaching your conclusions and opinions?

A The deposition given by Brad Purdy, affidavit of Dr. McCall-Perez, Dr. McCall-Perez's resume', statement given to the police by both Brad Purdy and

Christian Lerback, intake summary prepared by West River, transcript of the sentencing proceedings concerning Brad Purdy, and deposition given by Dr. McCall-Perez.

Q This is the same information that is reflected in Dr. McCall-Perez's affidavit of January 2, 1990; is that right? That is, I gave you the same information reflected in his affidavit?

A As I understand it, yes.

Q Of course, his deposition was taken after that, so that was the only addition, correct?

A right.

Q You have also heard the testimony of Dr. McCall-Perez here today, is that right?

A Yes, I have.

PAGE 61:2-62:10

Q Let me ask it in your professional opinion, are the conclusions, opinions, expressed by Dr. McCall-Perez valid on the issue of subjective intent or expectation in this sexual contact context?

A No, I do not agree with him.

Q What are your opinions, and why do you not agree?

A My opinion is that you really can't know -- I am uncertain whether Mr. Purdy had the expectation of some harm occurring or not.

There isn't substantiation for Dr. McCall-Perez's conclusions that there was, that he had no intent.

Another conclusion I had was that there are some factors which might lead one to think that Mr.

Purdy did have some expectation of harm.

PAGE 62:22-63:10

Q One of your conclusions was that there is insufficient data for Dr. McCall-Perez to reach his conclusions and opinions. What did you mean by that?

A The data that he had, you just can't draw those conclusions from it. It is insufficient.

PAGE 64:5-9

CROSS EXAMINATION BY MR. KNUDSEN:

Q With regard to your testimony about there being insufficient data on which Dr. McCall-Perez could base his conclusions, do you recall your deposition being taken a couple nights ago, Wednesday, January 24, 1991?

A Correct.

Q At that time, I asked you about that opinion, about the lack of substantiation, your allegation that there was a lack of substantiation?

A Correct.

PAGE 68:23-69:6

Q Had there been sufficient data available, it very well could have supported Dr. McCall Perez's conclusions, couldn't they?

MR. DIEBERT: Objection. Speculation and conjecture.

THE COURT: Overruled.

THE WITNESS: I would expand upon that answer. That would help, yes.

Q It could very well support Dr. McCall-Perez's conclusions, couldn't they?

A Or refute it.

Q But you don't know?

A I don't know.

PAGE 69:24-70:11

Q It is possible -- you say that it is possible that Mr. Purdy did not intend to harm those victims at the time these acts occurred?

A That is possible.

Q And it is possible that he did not expect any harm to come?

A That is possible.

PAGE 71:22-72:3

CROSS EXAMINATION BY MR. SCHLAUGER:

Q Dr. McGrath, I might have just one quick question, if I can just clear this up.

What Mr. Knudsen was asking you, again, it is very possible that Brad Purdy did not intend to harm the victims, is it not?

A Very possible.

PAGE 72:13-18

RECROSS EXAMINATION BY MR. KNUDSEN:

Q Well, I don't recall at the end whether your answer was to the

expectation question it is possible that Brad did not expect harm to occur, and I believe your answer was yes?

A At this point, I don't think we can know what his expectations or intentions were, but it is equally possible he did or he didn't.

PAGE 73:14-10

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

COURT'S DECISION

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,
vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

* * *

THE COURT: I will further state for the record that I have had an opportunity to continue to work on the file throughout the proceedings, largely due to the nature of the declaratory judgments in front of me, and the civil lawsuit in front of Judge Konenkamp, and counsel kept me well advised

throughout the proceedings of the status of that case as well.

I have had the opportunity, since the Court trial this morning, to consider all the exhibits that were received. Counsel and I at lunch were able to develop the transcripts that became exhibits 5 and 6, and I have had a chance to examine them as well as the deposition of Dr. McGrath as Mr. Deibert had furnished me at noon. I don't intent to enter a written decision in this matter. The oral pronouncement encompasses the findings and conclusions such as they are.

Counsel, I would invite you to submit written findings and conclusions pursuant to statute unless you intend to waive them.

The sole question presented here, I guess, is centered around the expected or intended language contained in the policy of insurance stipulated to by counsel to

have been in effect at the time of the actions by Mr. Purdy. That is contained, of course, in exhibits 1 and 2.

With that is the question of whether or not coverage is provided and American Family's duties to the defense. Understanding this has already taken place before Judge Konenkamp, a verdict rendered, I would assume with reservation of rights on the defense, none of which enter into the equation here based on the outcome of that case.

I will also state, as I am about to rule, I have no particular desire to affect the outcome of either this case or the case in front of Judge Konenkamp one way or the other.

I have considered carefully the excellent briefing that has been done here and, doug, your continued updated list of jurisdiction rulings that as a matter of law in these types of cases that anyone

with a clear mind essentially should understand that severe consequences befall a victim of sexual abuse, and that it certainly would fit within the exclusion of the expected or intended language particularly included in exhibits 1 and 2. Having, and without reciting each and every one of the cases, I know I will see them in findings or they will be presented to the Supreme Court, testimony this morning presented by Dr. McCall-Perez, I frankly find to be more credible than the testimony of Dr. McGrath. Both of them I feel testified honestly from their perspective. Dr. McGrath as a matter of fact at one point on questioning indicated that he was uncertain whether Mr. Purdy had an intention or an expectation of causing harm.

I am well aware of the rulings and the summary reversals by Courts of

appeal, and fully expect that that may well be the case in South Dakota.

It is a case of first impression here.

There is just something in my reading and interpreting what is presented to me when you have a matter that is subject to expert testimony and particularly in dealing with actions of the human mind that I can't find as a matter of law that there is an intention to cause harm in this instance.

In looking at general overall legal principles in our state, of course, insurance policies are construed strictly against the draft person or, in this case, against American Family.

Given their clear meaning, and there is nothing unclear about the language of expected or intended, I have no quarrel with exclusions in policies such as this.

The question here is whether or not the actions at issue come within the exclusionary language, and it is the measuring of those actions taken place here, not whether the policy is deficient or against sound principles of law, anything of that sort.

Examining the case that you presented, also, this noon, Mr. Deibert, the new case by our Supreme Court in December involved an error an errors and omissions situation. There, again, I think the ruling is right in that instance as to the City going ahead and constructing their roadway across the slough, an intentional act.

I just can't find from the evidence that is presented here the intent on Mr. Purdy's part to cause the harm.

The action was tried before Judge Konenkamp on a theory of negligent infliction of emotional distress.

I have reviewed the cases in South Dakota involving emotional distress and intentional tort, the subsequent case of Wright v. Coca-Cola Bottling Company, and I feel that this case comes more within the parameters of the Wright case in a negligent infliction of emotional distress.

Therefore, it would be the finding of the Court that the exclusionary language does not apply in this instance; that American Family is required by the terms of its policy to extend coverage for any damage as a result of Mr. Purdy's actions.

Is there any additional record that either of you want to make, counsel?L

Mr. Deibert: No, your Honor.

Mr. Knudsen: No, your Honor.

Mr. Schlauger: No, your Honor.

THE COURT: Okay.

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

JUDGMENT

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,
vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

This action having come on for trial before the Court sitting without a jury at the Pennington County Courthouse, Rapid City, South Dakota, at 9:00 o'clock a.m. on January 25, 1991; and

Plaintiff having appeared by its counsel Douglas M. Deibert of Cadwell, Sanford & Deibert, Sioux Falls, South

Dakota; Defendant Bradley Purdy having appeared by his attorney, Rodney Schlauger of Bangs, McCullen, Butler, Foye & Simmons, of Rapid City, South Dakota; and Defendants David Lerback and Jani Lerback and David Lerback as Guardian ad Litem of Christian Lerback and Andrew Lerback having appeared by their counsel, Donald P. Knudsen of Gunderson, Palmer, Goodsell & Nelson, of Rapid City, South Dakota; and

The Court having entered Findings of Fact and Conclusions of Law;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

That Plaintiff American Family Mutual Insurance Company is obligated to defend Defendant Bradley A. Purdy, and to indemnify him for any damages that may be adjudged in favor of David Lerback and Jani Lerback, and David Lerback as Guardian Ad Litem of Christian Lerback and Andrew Lerback, minors, relating to the

allegations of the Amended Complaint brought by the Lerbacks against Bradley Alan Purdy in Pennington County Case No. 88-903.

Dated at Rapid City, South Dakota, this 11th day of March, 1991.

BY THE COURT:

JEFF W. DAVIS
Circuit Court Judge

ATTEST:

_____
Clerk of Courts

By_____
Deputy
(SEAL)

STATE OF SOUTH DAKOTA
COUNTY OF PENNINGTON

IN CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT

File No. 88-1209

FINDINGS OF FACT AND CONCLUSIONS OF LAW

****

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff,

vs.

BRADLEY ALAN PURDY; DAVID
LERBACK and JANI LERBACK,
and DAVID LERBACK as Guardian
ad Litem of CHRISTIAN LERBACK
and ANDREW LERBACK, Minors,

Defendants.

****

On April 7, 1988, David and Jani Lerback and David Lerback as Guardian ad Litem for Andrew and Christian Lerback ("Lerbacks") commenced a law suit against Bradley A. Purdy ("Purdy), seeking compensation for damages allegedly caused by Mr. Purdy's sexually fondling the Lerback boys. Mr. Purdy was an insured under a homeowner's insurance policy purchased by his parents

from American Family Mutual Insurance Company ("American Family"). American Family arranged for the defense of Mr. Purdy in the personal injury action under a reservation of rights. American Family Insurance Company subsequently commenced an action for declaratory relief on June 9, 1988. American Family contends that it has no obligation to defend Bradley A. Purdy nor indemnify him for any judgment which may be rendered against him because the conduct as alleged in the Lerbacks' complaint in the personal injury action falls within an exclusion from coverage contained in the Purdys' homeowner's insurance policy. American Family Mutual Insurance Company's declaratory judgment action was tried to the Court on January 25, 1991. Based upon the evidence introduced at trial and the evidence contained in the record before the Court,

the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT:

1. From 1982 through 1986, Bradley A. Purdy was an insured under the homeowner's insurance policies issued by American Family to Richard and Carolyn Purdy, Bradley A. Purdy's parents.

2. The homeowner's policies state that the coverage does not apply ". . . to **bodily injury** . . .: a. which is expected or intended by any **insured**. . .."

3. The sexual contact between Purdy and the Lerback children consisted of Purdy fondling the Lerback childrens' geritals. There was no evidence of any other type of sexual contact between Purdy and the Lerback children.

4. Purdy is a pedophile who suffers impulsive/compulsive behavior problems.

5. Purdy's impulsive/compulsive behavior, combined with his narcissistic

personality and his pedophile mentality caused Purdy to impulsively or compulsively act out sexually under circumstances where anxieties or fears became intense.

6. At those times when Purdy acted out sexually by fondling the Lerback children, he did so purely for his own sexual gratification.

7. Purdy believed that the fondling of the Lerback children was a form of love and friendship.

8. Purdy believed that the fondling of the Lerback children would actually benefit the children in the future, or that it certainly would not harm the children.

9. Due to a combination of his pedophile mentality and his compulsive/impulsive psychological nature, Purdy did not intend to injure the Lerback children.

10. Due to the combination of his pedophile mentality and his

compulsive/impulsive psychological nature, Purdy did not expect
that any injury would occur as a result of sexually fondling the Lerback children.

11. The facts and legal conclusions stated by the Court on January 25, 1991, announcing the judgment of the Court are incorporated in these findings of fact and conclusions of law by this reference.

CONCLUSIONS OF LAW:

1. The exclusion on which American Family relies applies only where the insured intends or expects injury.

2. "Insured" as defined and used within the policy exclusion relied upon by American Family in this case refers to Bradley A. Purdy.

3. The exclusion does not preclude coverage in this case because Bradley A. Purdy did not intend to inflict any type of injury upon the Lerback children nor did

Bradley A. Purdy expect that they would be injured as a result of his conduct.

4. American Family is obligated to defend Bradley A. Purdy and to pay up to the policy limits for any judgment which may be rendered against Purdy in the underlying personal injury action which the Lerbacks have commenced against him.

Dated this 11th day of March, 1991.

BY THE COURT:

JEFF W. DAVIS
Circuit Court Judge

ATTEST:

_____
Clerk of Courts

By_____
Deputy

(SEAL)

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 17507

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff and Appellant,

vs.

BRADLEY ALAN PURDY, DAVID
LERBACK and JANI LERBACK, and
DAVID LERBACK as Guardian ad
Litem of CHRISTIAN LERBACK and
ANDREW LERBACK, Minors,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JEFF W. DAVIS
CIRCUIT COURT JUDGE PRESIDING

BRIEF OF APPELLEES, DAVID LERBACK and JANI LERBACK, and DAVID LERBACK as Guardian ad Litem of CHRISTIAN LERBACK and ANDREW LERBACK, Minors

NOTICE OF APPEAL FILED APRIL 18, 1991

PAGES 37-47:

I. INFERRING AN INTENT TO INJURE AS A MATTER OF LAW IN CASES INVOLVING SEXUAL ABUSE DENIES DUE PROCESS OF LAW TO PERPETRATORS WHO DO NOT INTEND INJURY AND DO NOT EXPECT THAT INJURY WILL OCCUR.

If the South Dakota Supreme Court follows the line of reasoning which infers an intent to injure or an expectation of injury as a matter of law in sexual abuse cases, insured who do not intend or expect injury would be deprived of their property rights without due process of law. Such a deprivation would be an unconstitutional violation of the rights guaranteed by Fifth and Fourteenth Amendments to the United States Constitution, and Article VI § 2 of the South Dakota Constitution.

A. AN INSURED HAS A PROPERTY INTEREST IN INSURANCE COVERAGE AND PROCEEDS.

The first step in analyzing whether there will be a procedural due process violation is to determine whether a liberty or property interest is involved. Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct.

2701 (1972); Carlson v. Hudson, 277 N.W.2d 715, 718 (S.D. 1979). United States Supreme Court has defined the term "property interest" as follows:

> "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims."

Roth, 408 U.S. at 577, 92 S. Ct. at 2709 (emphasis added).

The United States Supreme Court has further fleshed out the skeleton of procedural due process with the following language.

> [A] person's interest in a benefit is a "property" interest for due process purposes if there are . . . rules

> or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing.

Bishop v. Wood, 426 U.S. 341, 344, n. 6, 96 S. Ct. 2074, 2077 (1976), quoting Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694 (1972).

An insured under the terms of an insurance policy which provides coverage for bodily injury has a legitimate claim of entitlement to insurance protection by virtue of the contract of insurance. As the South Dakota Supreme Court recognized in Carlson, a contractual provision can give rise to a claim of entitlement which may not be deprived without due process. Carlson, 277 N.W.2d at 719. See also, Gray Panthers v. Schweiker, 652 F.2d 146, 148, n. 2 (D.C. Cir. 1981) (claimant's interest in receiving medical insurance benefits for which they had paid a monthly premium was a

property interest); Fayle v. Stapley, 607 F.2d 858, 861 (9th Cir. 1979) (interest in disability insurance benefits represent substantial property interests to which due process protection must be afforded).

To summarize, an insured under the terms of an insurance policy has a legitimate claim of entitlement to insurance benefits. The insured cannot be deprived of that property right without due process of law.

B. A RULE OF LAW WHICH INFERS AN INTENT OR EXPECTATION OF INJURY AS A MATTER OF LAW IN ALL CASES OF SEXUAL ABUSE DESPITE THE EXISTENCE OF EVIDENCE REFUTING SUCH INTENT OR EXPECTATION WOULD DEPRIVE INSUREDS OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW.

1. The language of the policy exclusion requires focus on the insured's subjective intent.

As demonstrated previously in this brief, the language of the insurance policy in this case requires the court to determine whether the insured subjectively

intended or expected injury. Rodriguez, 729 P.2d at 630.

2. Inferring an intent to injure or an expectation of injury from the very nature of the sexual contact creates an irrebuttable presumption.

The line of reasoning which infers an intent to harm as a matter of law from the very nature of the sexual contact makes evidence of the insured's subjective intent irrelevant. State Farm Fire and Casualty Company v. Smith, 907 F.2d 900, 903 (9th Cir. 1990) (intent to harm may be inferred from sexual contact with a minor as a matter of law, irrespective of the intent of the insured). See also Rodriguez, 729 P.2d at 629. Thus, although the language of the policy requires the court to inquire into the insured's subjective intent, adoption of this approach eliminates the need for any such inquiry. Id.

Courts applying this analysis have created an irrebuttable presumption that in every case of sexual abuse the perpetrator intends to injure his victim or expects that the victim will be injured due to the very nature of the act. State Farm Fire and Casualty Company v. Abraio, 874 F.2d 619, 623 (9th Cir. 1989) (the presumption of intent to harm is irrebuttable). This irrebuttable presumption denies the insured his property interest in insurance coverage without due process of law.

3. Irrebuttable presumptions are unconstitutional when the presumption is not necessarily or universally true in fact.

The United States Supreme Court has consistently struck down irrebuttable presumptions under circumstances where the presumption is not necessarily or universally true in fact and when there are alternative reasonable means for making the

determination. Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S. Ct. 791 (1974); Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972).

In Vlandis, the court considered whether a Connecticut statute which created an irrebuttable presumption that a person would be considered an "non-resident" for the entire time the person was enrolled in a Connecticut State University if, at the time the person applied for admission to the University, his legal address was out-of-state. Vlandis, 412 U.S. at 442-43, 93 S. Ct. at 2231-32. The United States Supreme Court struck down the irrebuttable presumption because it violated the due process clause as it provided no opportunity for students who applied from out-of-state to demonstrate that they subsequently became bona fide Connecticut residents. Id. at 453, 92 S. Ct. at 2237.

In discussing the constitutionality of irrebuttable presumptions, the court cited a string of cases holding that statutes which created a presumption operated to deny a fair opportunity to rebut the presumption violated the due process clause of the Fourteenth Amendment. Id. at 446, 92 S. Ct. at 2233. The court held that although Connecticut had an interest in easing its administrative burden in determining residency for purposes of calculating tuition, that interest was not sufficient to rescue the irrebuttable presumption from invalidity under the due process clause where there were other reasonable and practicable means of establishing the pertinent facts. Id. at 451, 93 S. Ct. at 2236. The court summarized by stating:

> [I]t is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and

> irrebuttable presumption of non-residents, when that presumption is not necessarily or universally true in fact, and when the state has reasonable alternative means of making the crucial determination. Rather standards of due process require that the state allow such an individual the opportunity to present evidence showing that he is a bona fide resident entitled to the in-state rates.

Id. at 452, 93 S. Ct. at 2236.

One year later, the United Supreme Court followed the Vlandis reasoning when it rendered the LaFleur opinion. Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S. Ct. 791 (1974). That case involved a school board policy which imposed on pregnant teachers a mandatory leave without pay, beginning five months before the expected birth of their child. Id. at 634-38, 94 Sup. Ct. 794-95. Several teachers filed suit against the

school board challenging the constitutionality of the maternity leave rule. Id.

The United States Supreme Court recognized that some teachers do indeed become physically disabled from effectively preforming their duties during the later stages of pregnancy. Id. at 644, 94 Sup. Ct. at 798. Nevertheless, that fact alone did not justify an irrebuttable presumption that all teachers become disabled during the later stages of pregnancy. Id.

> But the question is whether the rules sweep too broadly. [Cite omitted] That question must be answered in the affirmative, for the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor - or the school board's - as to any particular teacher's ability to

> continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual women's physical status might be wholly to the contrary.

Id. at 644, 94 S. Ct. at 798. The court reiterated its observation that permanent irrebuttable presumptions have long been disfavored under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution. Id.

To further illustrate the point, the court cited the case of Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972). That case involved the constitutionality of an irrebuttable presumption in the state of Illinois that unmarried fathers were incompetent to raise their children. Under the Illinois provision, the state took custody of illegitimate children upon the death of

their mother, without allowing the father to attempt to prove his parental fitness. The Stanley court stated:

> "It may be, as the state insists that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children."

Id. at 654, 92 S. Ct. at 1214 (footnotes omitted) (emphasis added).

These cases establish beyond dispute that an inflexible irrebuttable presumption violates the Due Process Clause of the United States Constitution and the South Dakota Constitution when such a presumption is not necessarily or universally true in fact and when there is a reasonable alternative means of making the crucial determination. LaFleur, 414

U.S. at 644-45, 94 S. Ct. at 798; Vlandis, 412 U.S. at 452 93 S. Ct. at 2236. Just as it was not universally true that all pregnant teachers cannot competently teach beyond the fourth month of pregnancy, and that all unmarried fathers are incompetent parents, so it is also not universally true that all perpetrators of sexual abuse intend to injure their victims or expect that harm will occur. See generally, Gebhard, Gagman, Palmeroy, et al, Sex Offenders, (Harper & Rowe, 1965). While it may be true in some cases, it is not true in all cases. Application of a rule of law holding that all perpetrators of sexual abuse intend or expect to injure their victims would deprive those pedophiles who do not harbor such intentions or expectations their property interest in insurance coverage without due process of law. These insureds would not be given a

fair opportunity to prove that they did not intend or expect to injure their victims.

4. Reasonable alternative means exist for determining whether an insured intends or expects injury.

Because it is not necessarily or universally true that all perpetrators intend or expect injury to their victims, a presumption to that effect would "sweep too broadly". LaFleur, 414 U.S. at 644, 94 S. Ct. at 798. This is particularly true because reasonable alternative means exist for determining an insured's intent and expectations.

American Family followed the correct procedure for determining whether its insured intended or expected injury to the Lerback children in this case. The proper procedure is found in the Uniform Declaratory Judgments Act located at SDCL Ch. 21-24. The provisions contained in the Uniform Declaratory Judgments Act provide that issues of fact - and issues of an

insured's intent are issues of fact, Ahl, 388 N.W.2d at 534 - can be tried and determined in the same manner as issues of fact are tried and determined in other civil actions. SDCL 21-24-9. That is precisely how the trial court reached its determination in this case.

Under the procedures set forth in the Uniform Declaratory Judgments Act, an insurer can attempt to prove that it should not be required to defend or indemnify an insured who has intended or expected the injury for which a claim is being made. These procedures ensure that an insured is not deprived of insurance coverage - a legitimate property interest - without due process of law. Both parties are given a fair opportunity to establish the facts rather than having a court invoke a fiction which is not necessarily or universally true.

5. Courts do not automatically infer intent or expectation

in cases involving other types of assaults.

In determining the applicability of the intentional injury exclusion in the context of other types of assaults, courts have not adopted such an inflexible, automatic inference regarding an insured's intentions or expectations. See Annotation, Construction and Application of Provision of Liability Insurance Policy Expressly Excluding Injuries Intended or Expected by Insured, 31 A.L.R. 4th 957 (1984). Rather, courts consider each case on its facts because in some circumstances, an insured may not intend or expect injury although the nature of the act itself, without further analysis, would lead to that conclusion. Id.

#17507-r-RWS

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

* * * *

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY, Plaintiff
and Appellant,

vs.

BRADLEY ALAN PURDY; D.L. and
J.L., and D.L. as Guardian
ad Litem of C.L. and
A.L., Minors, Defendants
and Appellees.

* * * *

APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

* * * *

HONORABLE JEFF W. DAVIS
Judge

* * * *

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* * * *

ARGUED December 3, 1991

OPINION FILED March 25, 1992

#17507

#17507

SABERS, Justice

Insurer (American Family) appeals a determination that it has a duty to defend and to pay for expected or intended injury arising from sexual contact. We reverse.

FACTS

Bradley Purdy (Purdy) sexually molested A.L. on approximately fifteen occasions when A.L. was between 4 and 6 years of age. Purdy also sexually molested C.L., A.L.'s older brother, on three occasions. The molestation of both children consisted of Purdy fondling their genitals, there was no evidence of any oral or anal penetration.

These incidents occurred in Rapid City, South Dakota, during a time period when Purdy was a student at Brigham Young University in Provo, Utah. He also spent a period of time in Germany. However, Purdy considered himself a resident of his

parents' household in Rapid City. Thus, Purdy meets the definition of "insured" under his parents' homeowner's policy.

A.L. described four of the incidents with Purdy. Three occurred in the children's home with Purdy shutting the bedroom door, sitting against it with A.L. between his legs and then rubbing A.L.'s genitals for about 10 minutes. Each of the four described incidents ended with Purdy asking A.L. if it felt good, to which A.L. responded "No." On the final described incident Purdy threatened A.L. not to tell his parents. Purdy followed a similar pattern with C.L. and on one occasion, although no apparent threats were made, Purdy asked C.L. if he were okay.

Purdy was criminally prosecuted for these acts in 1986. Purdy received a suspended imposition of sentence and satisfied the terms imposed by the court.

The children's parents (Parents) filed this civil action in their own right and as guardians of the children against Purdy and his parents.[1] Parents alleged that Purdy "negligently and without the intent to harm, touched and fondled the [children] in an indecent manner."

American Family brought a declaratory judgment action claiming it had no duty to defend or indemnify Purdy for the claims contained in the complaint. American Family twice moved for summary judgment and both motions were denied. A court trial was held. The issue was whether the policy, which excluded coverage for any bodily injury which is either "expected or intended" by the insured, provided coverage and a duty to defend.

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[1]. Purdy's parents were dismissed on summary judgment.

The testimony of psychologist Dr. Fred McCall-Perez, was offered to dispute the allegation that Purdy intended to harm the children as a result of his conduct. Dr. McCall-Perez testified that in his opinion, Purdy did not intend to injure nor expect his conduct to harm the children. This opinion was based upon his determination that Purdy has a very narcissistic or self-centered personality, that Purdy felt the history of his own abuse had not affected him in any adverse way, that Purdy's pedophile behavior was unconscious - similar to a bad habit, and that Purdy viewed his acts as an expression of love.

American Family offered the testimony of psychologist Dr. Michael McGrath to challenge the opinion of Dr. McCall-Perez. Dr. McGrath testified that there was insufficient foundation to determine Purdy's expectations or intent. However,

Dr. McGrath testified that it was equally possible that Purdy expected or intended harm as it was that no expectation or intent of harm existed. The testimony of Purdy, A.L. and C.L. was received by deposition. The court found that not only did Purdy not expect or intend to harm the children, but that to Purdy, the fondling was a form of love and would benefit the children.[2] The court concluded that

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[2]. The trial court's Findings of Fact:

. . .

5. Purdy's impulsive/compulsive behavior, combined with his narcissistic personality and his pedophile mentality caused Purdy to impulsively or compulsively act out sexually under circumstances where anxieties or fears became intense.

. . .

7. Purdy believed that the fondling of the . . . children was a form of love and friendship.

American Family was obligated to defend Purdy and to pay up to policy limits for any judgment rendered against him. American Family appeals, claiming the court erred in denying summary judgment and erred as a matter of law in concluding that the policy exclusion did not apply.

1. EXPECTED OR INTENDED INJURY

The question is whether the trial court erred or was clearly erroneous in determining that Purdy neither expected or intended harm from his sexual contacts with the children. The homeowner's policy, under which Purdy is an insured, ccntains a provision excluding coverage for "bodily injury or property damage . . . which is expected or intended by any insured." When

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8. Purdy believed that the fondling of the . . . children would actually benefit the children in the future, or that it certainly would not harm the children.

an insurer seeks to invoke a policy exclusion as a means of avoiding coverage, the insurer has the burden of proving that the exclusion applies. Western Cas. & Sur. Co. v. Anderson, 273 N.W.2d 203, 205 (S.D. 1979). For the exclusion to apply in this case, it must be shown that Purdy expected or intended injury to the children - not merely the acts of molestation.

> It surely is not the act of the insured which must be expected or intended for the [exclusion] to take effect.

Tri-State Co. of Minnesota v. Bollinger, 476 N.W.2d 697, 701 (S.D. 1991) (emphasis original).

The majority of jurisdictions that have addressed this issue have held that through the very nature of acts of criminal sexual contact or rape, injury is either inherent or the intent to injure will be inferred as

a matter of law.[3] In Western Nat. Assur.

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[3]. See, e.g., State Farm Fire & Cas. Co. v. Smith, 907 F.2d 900 (9th Cir. 1990); Foremost Ins. Co. v. Weetman, 726 F.Supp. 618 (W.D.Pa. 1989); Allstate Ins. Co. v. Thomas, 684 F.Supp. 1056 (W.D.Okla. 1988); Allstate Ins. Co. v. Roelfs, 698 F.Supp. 815 (D.Alaska 1987); Allstate Ins. Co. v. Foster, 693 F.Supp. 886 (D.Nev. 1988); Allstate Ins. Co. v. Jack S., 709 F.Supp. 963 (D.Nev. 1989); CNA Ins. Co. v. McGinnis, 666 S.W.2d 689 (Ark. 1984); Twin City Fire Ins. Co. v. Doe, 788 P.2d 121 (Ariz.App. 1989); J.C. Penney Cas. Ins. Co. v. M.K., 804 P.2d 689 (Cal. 1991); Allstate Ins. Co. v. Troelstrup, 789 P.2d 415 (Colo. 1990); Landis v. Allstate Ins. Co., 546 So.2d 1051 (Fla. 1989); Allstate Ins. Co. v. Jarvis, 393 S.E.2d 489 (Ga.App. 1990); Roe v. State Farm Fire & Cas. Co., 373 S.E.2d 23 (Ga.App. 1988); Scudder v. Hanover Ins. Co., 559 N.E.2d 559 (Ill.App. 2 Dist. 1990); Altena v. United Fire & Cas. Co., 422 N.W.2d 485 (Iowa 1988); Perreault v. Maine Bonding & Cas. Co., 568 A.2d 1100 (Me. 1990); Harpy v. Nationwide Mutual Fire Ins., 545 A.2d 718 (Md.App. 1988); Worcester Ins. v. Fells Acres Day School, 558 N.E.2d 958 (Mass. 1990); State Mut. Ins. Co. v. Russell, 462 N.W.2d 785 (Mich.App. 1990); Auto-Owners

Co. v. Hecker, 719 P.2d 954, 960 (Wash.App.

Ins. Co. v. Gardipey, 434 N.W.2d 220 (Mich.App. 1988); Linebaugh v. Berdish, 376 N.W.2d 400 (Mich.App. 1985); Estate of Lehmann by Lehmann v. Metzger, 355 N.W.2d 425 (Minn. 1984); State Farm Fire & Cas. Co. v. Williams, 355 N.W.2d 421 (Minn. 1984); Horace Mann Ins. Co. v. Ind. Sch. Dist., 355 N.W.2d 413 (Minn. 1984); Fireman's Fund Ins. Co. v. Hill, 314 N.W.2d 834 (Minn. 1982); Illinois Farmers Ins. Co. v. Judith G., 379 N.W.2d 638 (Minn.App. 1986); Mutual Service Cas. Ins. Co. v. Puhl, 354 N.W.2d 900 (Minn.App. 1984); New Hampshire Ins. Group v. Strecker, 798 P.2d 130 (Mont. 1990); State Farm Fire & Cas. v. van Gorder, 455 N.W.2d 543 (Neb. 1990); Vermont Mut. Ins. Co. v. Malcolm, 517 A.2d 800 (N.H. 1986); Atlantic Employers Ins. Co. v. Tots & Toddlers, 571 A.2d 300 (N.J. Super.A.D. 1990) cert. denied, 584 A.2d 218 (N.J. 1990); Western Nat. Assur. Co. v. Hecker, 719 P.2d 954 (Wash.App. 1986); Rodriguez by Brennan v. Williams, 713 P.2d 135 (Wash.App. 1986); Horace Mann Ins. Co. v. Leeber, 376 S.E.2d 581 (W.Va. 1988); N.N. v. Moraine Mut. Ins. Co., 450 N.W.2d 445 (Wis. 1990); K.A.G. by Carson v. Stanford, 434 N.W.2d 790 (Wis.App. 1988).

1986), the court held "that an act of forcible oral intercourse is an act of such a character that an intent to cause injury can be inferred as a matter of law." (emphasis original). The exclusion in the perpetrator's homeowner's policy stated that coverage would not extend to "liability . . . caused intentionally by . . . any insured." Id. at 957. In Rodriguez by Brennan v. Williams, 713 P.2d 135 (Wash.App. 1986) two cases were consolidated for appeal. Both cases dealt with father/stepfather's sexual contact with his child/stepchild. The court held that "[a]cts of this nature are of such a character that an intention to inflict injury can be inferred as a matter of law." Id. at 138. Both policies in Rodriguez excluded coverage for injury "expected or intended." Id. at 137.

In CNA Ins. Co. v. McGinnis, 666 S.W.2d 689 (Ark. 1984), the insured/stepfather sexually assaulted and abused his stepdaughter. The court, in holding that the exclusion applied stated "that for a stepfather in such a situation 'to claim that he did not intend to cause injury, flies in the face of all reason, common sense and experience.'" Id at 691. In Vermont Mut. Ins. Co. v. Malcolm, 517 A.2d 800 (N.H. 1986), the court held that the sexual assault committed by the insured on an 11-year old boy was not an "occurrence" within the policy and therefore not covered.[4] In reaching this conclusion, the court stated:

> The assaults were inherently injurious in the most obvious sense that they could not be performed upon a boy without appalling effects on his mind as well as forbidden

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[4]. By so holding, the Vermont Mut. court did not address the policy provision excluding coverage for expected or intended injury.

contacts with his body. This common understanding of the nature of such acts is beyond reasonable dispute and consistent with the legislative classifications of the acts within the most serious category of sex offenses[.]

Id. at 802-3 (citations omitted).

In Linebaugh v. Berdish, 376 N.W.2d 400 (Mich.App. 1985), the court held that:

[E]ngaging in sexual penetration with an underage female would be an . . . (intentional act) and the intent to injure or harm can be inferred as a matter of law from the alleged sexual penetration of said child. Thus, the exclusion in the insurance policy applies to the facts in the instant case.

Id. at 405. The homeowner's policy in Linebaugh contained the exclusion for "injury . . . intentionally caused by . . . the Insured." Id. at 402. In Fireman's Fund Ins. Co. v. Hill, 314 N.W.2d 834 (Minn. 1982), the court held that criminal sexual contact by the insured with a foster child" was such that an intention to inflict injury can be inferred as a matter of law." Id. at 835. Therefore, the Hill

court held that the policy provision excluding "bodily injury . . . which is either expected or intended from the standpoint of the insured" applied. Id.

Generally, the matter of coverage should be determined on a case by case basis as a question of fact after a consideration of all competent evidence by the fact finder. The classic statement of the fact finding process appears in Shook v. Tinny, 461 N.E.2d 642 (Ill. App. 3 Dist. 1984), as follows:

> The circumstances under which the act in question was done usually serve to manifest to a greater degree the intent of the actor and may overcome his declaration as to his intention, but he has the right to testify to his intention and to have the circumstances surrounding the act considered in connection with his testimony.

Id. at 646 (quoting People v. Biella, 28 N.E.2d 111, 112 (Ill. 1940)). However, the majority view in criminal sexual contact cases is to infer, as a matter of law, that

harm was expected or intended. We find the majority position persuasive.

Purdy claims that the recent case of Tri-State, is dispositive in this case. Purdy claims that this policy language and Tri-State establish that the court must determine whether the injury, rather than the act, was expected or intended from the standpoint of the insured. Although Purdy is correct under this policy language, this issue is determined from all the acts and conduct of the insured and not simply from his after the fact statements as to his expectations or intentions.[5]

We agree with American Family that Tri-State is factually distinguishable from

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[5]. Although we agree that the factual question is one of insured's intent, we do not agree that insured's own testimony must be considered conclusive on the issue under the circumstances of this case. Shook, 461 N.E.2d at 645.

this case. Tri-State involved a spur of the moment fight between two former friends both of whom had been drinking. The host attempted to remove the guest from his home by striking him, a fight ensued which eventually resulted in a broken ankle for the guest - a result which may have been unexpected or unintended from an 'intentional blow. In contrast, this case involves repeated deliberate sexual contacts with young boys over a four year period. American Family argues that if injury was not intended in the strict sense, at the very least, injury, adverse consequences, emotional stress, or other harm is certainly expected by a child molester.

In examining the facts of this case, we note that: Purdy was an intelligent young man, who graduated from high school with honors. As a freshman at B.Y.U. he had a

grade point average of 3.2. He was a victim of sexual contact himself when he was 10 to 11 years old. He stated that his prior victimization caused him considerable mental pain over the years including guilt, fear, shame and embarrassment. He could never bring himself to discuss this with his parents, despite what he considered a good relationship.

When initiating sexual contact with the children, Purdy thought about his own experiences. Following each contact with the children, he told himself he wouldn't and shouldn't do it again. Purdy stated that he knew no good would result from these contacts with the children - either for himself or for them. In addition, as indicated above, Purdy closed and blocked the door and then held and sexually abused the children. He also bribed or threatened them not to tell their parents and, at the

conclusion of one incident, inquired whether C.L. was okay. Purdy's testimony was received by way of deposition.

> We have repeatedly held that the clearly erroneous rule does not apply to evidence presented by a deposition or other means where the witness does not appear before the trial judge. There is no presumption in favor of the trial court's determination. It is our duty to review the evidence and determine the issues involved as though presented here in the first instance.

State v. Abourezk, 359 N.W.2d 137, 142 (S.D. 1984) (citations omitted). Therefore, despite the testimony of Purdy and the Affidavit of Dr. McCall-Perez, it is clear that Purdy was aware of the harmful effects of such conduct. In addition, Purdy cannot claim a version of the facts more favorable to himself than his own testimony. Trammell v. Prairie States Ins. Co., 473 N.W.2d 460, 463 (S.D. 1991); Waddell v. Dewey County Bank, 471 N.W.2d 591, 595 n. 3 (S.D. 1991); Miller v. Stevens, 256 N.W. 152, 155 (S.D. 1934).

The trial court's memorandum opinion stated that summary judgment would be proper only if as a matter of law it could rule that Purdy expected or intended harm to the children. The court stated that based upon Purdy's testimony, that he did not intend to harm the children, and upon the Affidavit of Dr. McCall-Perez, in which he stated Purdy "does not intend to harm the victims of his act," a genuine issue of material fact existed - i.e. whether Purdy expected or intended to harm the children through his actions. Although the trial court's analysis is correct under our summary judgment cases, Groseth Intern., Inc. v. Tenneco, Inc., 410 N.W.2d 159, 164 (S.D. 1987); Wilson v. Great Northern Railway. Co., 157 N.W.2d 19, 21 (S.D. 1968), we carve an exception to this general rule for criminal sexual contact

cases and infer as a matter of law that harm was expected or intended.

We rule that this insured either expected or intended injury to these victims from his sexual contact with them. Therefore, despite the testimony of Purdy and the Affidavit of Dr. McCall-Perez, we hold these acts of criminal sexual contact are of such a nature that the intent to inflict bodily injury will be inferred as a matter of law. The exclusion for bodily injury either "expected or intended" in this policy applies to these facts. Since the exclusion applies, there is no coverage under the policy and American Family has no duty to defend Purdy in the underlying action. We reverse the trial court's denial of summary judgment.

MILLER, Chief Justice, WUEST, HENDERSON, and AMUNDSON, Justices, concur.

#17507

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 17507

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff and Appellant,

vs.

BRADLEY ALAN PURDY, DAVID
LERBACK and JANI LERBACK, and
DAVID LERBACK as Guardian ad
Litem of CHRISTIAN LERBACK and
ANDREW LERBACK, Minors,

Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

THE HONORABLE JEFF W. DAVIS
CIRCUIT COURT JUDGE PRESIDING

PETITION FOR REHEARING

NOTICE OF APPEAL FILED APRIL 18, 1991

PAGES 3-16

A rehearing of the cause heard on appeal to the South Dakota Supreme Court is necessary because the court has overlooked the constitutional violations inherent in the adoption of the judicially created law set forth in the court's opinion, and because the court has misapplied South Dakota law in the method with which it analyzed the cause on appeal. The constitutional violations and the misapplication of the law are discussed below.

CONSTITUTIONAL VIOLATIONS

C. Due Process.

1. State may not deprive citizens of property without due process.

The Bill of Rights of the United States Constitution guarantees that no person shall be deprived of property without due process of law. United States Constitution, amendment V. This protection

was made applicable to the states through the fourteenth amendment. United States Constitution, amendment XIV, section 1. In addition, the constitution of the State of South Dakota guarantees that no person shall be deprived of property without due process of law. South Dakota Constitution, article VI, section 2.

2. Those insured under policies of insurance have a property interest in insurance coverage.

An insured under the terms of an insurance policy which provides coverage for bodily injury has a legitimate claim of entitlement to insurance protection by virtue of the contract of insurance. A contractual provision can give rise to a claim of entitlement which may not be deprived without due process. Carlson v. Hudson, 277 N.W.2d 715, 718 (S.D. 1979). Therefore, insureds have a legitimate property interest in insurance protection.

See for example, Gray Panthers v. Schweiker, 652 F.2d 146, 148 n. 2 (D.C. Cir. 1981) (claimant's interest in receiving medical insurance benefits for which they had paid a monthly premium was a property interest); Fayle v. Stapley, 607 F.2d 858, 861 (9th Cir. 1979) (interest in disability insurance benefits represent substantial property interests to which due process protection must be afforded).

3. Court's opinion creates irrebuttable presumption.

The law created by the court's opinion in this case creates an irrebuttable presumption. The court judicially created a law which states that in every case involving criminal sexual contact, the perpetrator intends or expects to injure the victim. The inference is "as a matter of law." In other words, no factual evidence can rebut the presumption. Therefore, the presumption is

"irrebuttable." State Farm Fire & Casualty Company v. Abraio, 874 F.2d 619, 623 (9th Cir. 1989) (the presumption of intent to harm is irrebuttable).

4. The irrebuttable presumption operates to negate insurance coverage.

The irrebuttable presumption has the effect of eliminating insurance coverage. Typically, homeowner's insurance policies as well other types of insurance policies contain an exclusion which excludes any coverage for injury which is intended or expected by the insured. A judicially created law which holds in every case of criminal sexual contact that the insured intended or expected injury serves to automatically eliminate any insurance coverage for the acts of criminal sexual contact.

5. The irrebuttable presumption is not necessarily or universally true.

The irrebuttable presumption created by the court's opinion in this case is not necessarily or universally true. The court need look no further than the record of this case to find evidence that the inference that all criminal sexual offenders intend or expect harm is not necessarily or universally true. Dr. McCall-Perez, Ph.D., testified that in his opinion Purdy did not intend to injure Christian or Andrew Lerback and did not expect they would be injured.[6] (T pp. 14-29, see especially pp. 17-18) Moreover, American Family's own expert testified that if the mental evidence was available which he believed was necessary to determine Purdy's expectations or intentions at the

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[6]In fact, American Family has never claimed that Purdy did intend to injure the Lerback children. At oral argument before the South Dakota Supreme Court, American Family's counsel conceded that he believed Purdy had not intended to injure the Lerback children.

time of the criminal sexual abuse, that evidence could reveal that Purdy did not intend injury and did not expect that injury would occur. (T pp. 71-73)

Both Dr. McCall-Perez and Dr. McGrath (American Family's expert) hold Ph.D.'s in clinical psychology. Both experts are well informed with respect to the mental traits of pedophiles. The testimony of both experts reveals that the court's inference of an intended or expected injury is not necessarily or universally true. One expert testified positively that Purdy did not intend or expect injury; one expert testified that it was possible that Purdy did not intend or expect injury. Thus, the record before the court proves that the inference is not necessarily or universally true.

Not only is the record before the court devoid of evidence to support the inference

that criminal sexual offenders always intend or expect to injure their victims, so is the psychological literature. See for example D. Finkelhor, Child Sexual Abuse, (1984); Gebhard, Gagman, Palmeroy, et al, Sex Offenders, (Harper & Row 1965).

6. The irrebuttable presumption is unconstitutional.

Irrebuttable presumptions which are not necessarily or universally true, and which serve to deprive citizens of constitutionally guaranteed rights without due process of law are unconstitutional. Vlandis v. Kline, 412 U.S. 441, 93 S. Ct. 2230 (1973); Cleveland Board of Education v. LaFleur, 414 U.S. 632, 94 S. Ct. 791 (1974); Stanley v. Illinois, 405 U.S. 645, 92 S. Ct. 1208 (1972). Each of these cases are discussed in Lerbacks' Appellees' Brief at pp. 40-43. Briefly summarized, they stand for the proposition that before a citizen may be deprived of constitutionally

guaranteed rights, the citizen is entitled to a fair hearing to contest the proposed deprivation. A law which creates an irrebuttable presumption and thereby deprives the citizen of constitutionally guaranteed rights without the benefit of a hearing will not withstand constitutional analysis where the presumption is not necessarily or universally true. In other words, before a presumption can serve as a basis for depriving constitutional rights, the citizen must be given an opportunity to rebut the presumption if it is not necessarily or universally true.

The court's opinion in this case gives birth to a judicially-created law which raises an irrebuttable presumption that all perpetrators of criminal sexual contact intend or expect to injure their victims. While that certainly may be true in some cases, psychological evidence in general,

and the evidence before the trial court in this case in particular, demonstrates that it is not true in every case.

The irrebuttable presumption created by the court's opinion in this case is not necessarily or universally true. Therefore, the rule of law created by the court's opinion violates the Constitution of the United States and the South Dakota Constitution because it serves to deprive perpetrators of criminal sexual contact of a legitimate property interest - insurance coverage - without due process of law. To comply with constitutional mandates, perpetrators of criminal sexual contact must be provided a hearing on the issue of whether they intended or expected to injure their victim before they may be deprived of insurance coverage based on the intentional injury exclusion.

This argument was raised in Lerbacks' Appellees' Brief at pp. 37-45. Nevertheless, the court overlooked this argument as is evidenced by the failure of the court to even mention that the argument had been presented to the court.

Because the court's opinion gives birth to a judicially-created law creating an unconstitutional irrebuttable presumption which is not necessarily or universally true, a rehearing of the cause on appeal is necessary for the court to reconcile its opinion with the mandates of constitutional due process.

D. Equal Protection.

1. States may not deny equal protection of the laws to persons within their jurisdictions.

In addition to depriving policy holders of insurance coverage without due process of law, the court's opinion has the effect of denying equal protection of the laws to

a specific class of individuals - criminal sexual offenders.

The United States Constitution provides that no state shall deny to any person within its jurisdiction the equal protection of the laws. United States Constitution, amendment XIV, section 1. The same is true under the Constitution of South Dakota. South Dakota Constitution, article VI, section 18. Equal protection clauses of the United States and South Dakota Constitutions require that every person's rights be governed by the same rule of law under similar circumstances. Roden v. Solem, 411 N.W.2d 421 (S.D. 1987).

2. The court's opinion serves to deny equal protection of the laws to criminal sexual offenders.

The creation of an irrebuttable presumption that criminal sexual offenders invariably intend or expect to injure their victims establishes a rule of law which

treats individuals in similar circumstances differently. If the individual is involved in a criminal assault not involving sexual contact, the insured person is entitled to a hearing to determine whether that person intended or expected to injure the victim. Tri-State Insurance Company of Minnesota v. Bollinger, 476 N.W.2d 697 (S.D. 1991). Conversely, a perpetrator of assault and battery which involves sexual contact is not given the same protection under the law created by the court in this case. Since the law infers that criminal sexual offenders always intend or expect to injure their victims, there is no longer any purpose to be served by a hearing to determine the perpetrator's intentions or expectations. Sexual offenders do not get the protection the law provided to other perpetrators of assault and battery.

The court's opinion in this case establishes a rule of law which discriminates against sexual offenders purely on the basis of the nature of the act of physical assault. The court does so without the benefit of explaining why sexual offenders, unlike other types of offenders, are incapable of operating under a mental disease or defect which would preclude a finding that the individual intended or expected to injure the victim.

The law gives all criminal offenders the opportunity to negate the element of intent by proving such a mental impairment. SDCL 22-5-10. No legitimate basis exists in this case for departing from that rule solely on the basis of the sexual nature of the act involved. Sexual offenders, like all other persons, can be legally insane. Their subjective intentions and

expectations are just as much questions of fact as in any other case.

The court's error in establishing this "inference as a matter of law" is made even more egregious by the fact that the expert testimony contained in the record establishes that it is possible that some perpetrators of criminal sexual contact do not intend or expect injury. (T pp. 14-29, 71-73) American Family introduced no evidence to the contrary. Thus, there was no evidence in the record which would support the court's opinion.

Lerbacks alerted the court to the disparate treatment of perpetrators of sexual assault when compared to the treatment of perpetrators of other types of assault (for example, assault and battery). Lerbacks' Appellees' Brief at p. 45. Because the court's opinion deprives criminal sexual abusers of equal protection

of the laws by eliminating the necessity of a hearing to determine the perpetrator's intentions or expectations when such hearings are provided to other individuals, the court's opinion unconstitutionally denies equal protection of the laws to criminal sexual offenders. Therefore, rehearing of the cause on appeal is necessary for the court to reconcile its opinion with the constitutional mandate that all persons be provided equal protection of the laws.

C. Impairment of the Obligation of Contract

1. States may not create law impairing the obligation of contracts.

The Constitution of the United States and the South Dakota Constitution both prohibit the establishment of any law which impairs the obligation of contracts. United States Constitution, article I,

section 10, clause 1; South Dakota Constitution, article VI, section 12.

When considering whether judicial decisions which "make" law fall within the purview of these constitutional provisions, the courts have generally held in the negative. Central Land Company v. Laidley, 159 U.S. 103 (1895). See also N.O. Waterworks Co. v. La. Sugar Co., 125 U.S. 18 (1888); Hanford v. Davies, 163 U.S. 273 (1896); Ross v. Oregon, 227 U.S. 150 (1913); Detroit United Ry. v. Michigan, 242 U.S. 238 (1916); Long Sault Development Co. v. Call, 242 U.S. 272 (1916); McCoy v. Union Elevated R. Co., 247 U.S. 354 (1918); Columbia G. & E. Ry. v. South Carolina, 261 U.S. 236 (1923); Tidal Oil Co. v. Flannagan, 263 U.S. 444 (1924). See also The Constitution of the United States of America: Analysis and Interpretation, pp. 383-415 (U.S. Gov't Printing Office 1973)

(hereinafter referred to as "Constitutional Analysis and Interpretation"). However, in 1922, the Congress amended the judicial code to give the United States Supreme Court the power to review cases which alleged that a change in the rule of law by the highest court of a state was repugnant to the Constitution of the United States. Constitutional Analysis and Interpretation at p. 385.

The United States Supreme Court initially declined the power Congress had authorized and instead relied on the federal courts' power to determine state law. Tidal Oil Co. v. Flanagan, 263 U.S. 444, 450, 451-452 (1924). That reasoning, however, was severely eroded by a United States Supreme Court decision which reduced federal courts' abilities to decide cases based on their own notions of general principles of common law. Erie Railroad

Co. v. Tompkins, 304 U.S. 64 (1938). The Erie decision sufficiently undermines the United States Supreme Court's prior decisions as to raise the question whether the court will be forced to apply the obligations of contracts clause to judicial decisions as well as statutes and other legislative rules. Constitutional Analysis and Interpretation at p. 386.

There is no logical reason why the obligations of contracts clause should not apply to judicial decisions. When a state's highest court renders a decision, the state passes a law just as legally binding as if the state's legislature had enacted legislation. If the judicially created law impairs the obligations of contract, it offends constitutional principles every bit as much as offensive legislation. Constitutional Analysis and Interpretation at p. 385. A rule of law

contained in a decision of the state's highest court has as much legal effect as a statute or ordinance. The state's highest court, as an arm of state government, is certainly a "state actor" for constitutional purposes.

2. The plain language of the intentional injury exclusion does not automatically void coverage in criminal sexual contact cases.

The homeowners policy at issue in this case contains a provision which excludes coverage for injuries which are intended or expected by the insured (Index 61). The South Dakota Supreme Court has recognized that these intentional injury exclusions are not ambiguous. Klatt v. Continental Insurance Company, 409 N.W.2d 366, 370 (S.D. 1987). Where the language of the insurance policy is not ambiguous, the parties must abide thereby. Presentation Sisters, Inc. v. Mutual Benefit Life Insurance Company, 189 N.W.2d 452, 454

(S.D. 1971). The insurance provision is not ambiguous; therefore, both parties must abide by the language of the intentional injury exclusion; and the South Dakota Supreme Court may not create a law which impairs the obligations of contract.

3. The court's opinion enlarges the language of the intentional injury exclusion.

The plain language of the intentional injury exclusion limits the scope of the exclusion to injuries which are intended or expected by the insured. The language drafted by American Family contains no provisions specifically directed to excluding coverage for any injuries inflicted by the insured's criminal sexual conduct. Thus, the plain language of the intentional injury exclusion would exclude coverage in a criminal sexual contact case only if the insured intended or expected the injury. The effect of the court's

opinion is to enlarge the language of the intentional injury exclusion. In effect, the court has amended the exclusion to read as follows: "Not only is an injury which is expected or intended by the insured excluded from coverage, so also is every injury caused by the insured's criminal sexual contact regardless of the insured's actual subjective intentions or expectations." The practical effect of the court's ruling is to add an exclusion to the policy which did not originally exist under the policy's plain language.

4. The effect of the court's ruling is to impair obligations of contracts between insurers and insureds when insureds engage in criminal sexual contact without intending or expecting to injure their victims.

The plain language of the intentional injury exclusion would not exclude coverage (i.e. coverage would be provided) under circumstances where, although the insured engaged in criminal sexual contact, the

insured did not, as a matter of fact, subjectively intend or expect to injure the victim. The court's holding in this case impairs American Family's obligations under the contract because American Family is relieved of the obligation to indemnify Brad Purdy for the injuries suffered by the Lerbacks even though Purdy did not intend or expect to injure them, despite the fact that the plain language of the intentional injury exclusion requires American Family to provide such indemnification.

Insurers have the duty to define any limitations or exclusionary clauses in clear and explicit terms. Leuchtenmacher v. Farm Bureau Mutual Insurance Company, 461 N.W.2d 291, 294 (Iowa 1990). Failure to do so subjects the insurer to the risk that a court may adopt an alternative interpretation more favorable to the insured. Id. American Family did not

explicitly exclude coverage for injuries caused by the insured's criminal sexual contact. Therefore, unless the insured intended or expected injury, the intentional injury exclusion cannot provide a basis for excluding coverage in this case and American Family is contractually obligated to indemnify Brad Purdy for the injuries suffered by the Lerback children.

5. The court's opinion unconstitutionally impairs the obligations of contract.

The language of the homeowners policy drafted by American Family defined American Family's obligations to Brad Purdy and, consequently, to those injured by Brad Purdy's conduct. The plain language of the intentional injury exclusion would not relieve American Family of its duty to defend and indemnify Brad Purdy for sexually molesting the Lerback children unless Brad Purdy in fact subjectively

intended or expected to injure the Lerback children. The trial court, based upon evidence presented at the declaratory judgment trial, entered findings of fact holding that Brad Purdy did not intend or expect to injure the Lerback children. Therefore, under the plain language of the insurance contract, American Family was obligated to defend and indemnify Brad Purdy. The Supreme Court of the State of South Dakota created a rule of law which impairs American Family's contractual obligations toward Brad Purdy and, consequently, to those parties injured by Brad Purdy. The rule of law set forth in the court's opinion operates to engraft onto the homeowners policy drafted by American Family a provision which eliminates coverage which would otherwise have been afforded. Therefore, the court's opinion unconstitutionally impairs the

obligation contained in the homeowners insurance contract.

Because the court's opinion unconstitutionally impairs contractual obligations, a rehearing of the cause on appeal is necessary for the court to reconcile its opinions with the Constitution of the United States, article I, section 10, clause 1; and the South Dakota Constitution, article VI, section 12.

#17507

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 17507

AMERICAN FAMILY MUTUAL
INSURANCE COMPANY,

Plaintiff and Appellant,

vs.

BRADLEY ALAN PURDY,

Defendant,

and

DAVID LERBACK and JANI LERBACK, and
DAVID LERBACK as Guardian ad
Litem of CHRISTIAN LERBACK and
ANDREW LERBACK, Minors,

Defendants and Appellees.

ORDER DENYING REHEARING

A Petition for rehearing in the above cause having been filed April 13, 1992, and no issue or question of law or fact appearing to have been overlooked or

misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices thereof requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

Dated at Pierre, South Dakota, April 29, 1992.

BY THE COURT:

Robert A. Miller, Chief Justice

Filed April 29, 1992